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No. 00-497

Supreme Court, U.S.
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In the Supreme Court of the United States

FORD MOTOR COMPANY, *Petitioner*,

v.

DOLORES CLAY, AS ADMINISTRATRIX OF THE ESTATE OF KATHLEEN P. CLAY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents do not take issue with the principal contentions made in the petition. They do not deny that the issues presented in this case have the potential to arise every time the admissibility of expert testimony is challenged in federal court and are vitally important to the proper administration of Federal Rule of Evidence 702. They do not dispute that, in the Tenth Circuit, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *requires* that trial courts expressly state their reasons for admitting or excluding expert testimony – and they concede that the Sixth Circuit did not require such an explanation here. They do not dispute that review for abuse of discretion, as required in *General Electric Co.* v. *Joiner*, 522 U.S. 136 (1997), is virtually impossible unless trial courts explain their admissibility determinations. Finally, they do not deny that the failure to consider a relevant and applicable *Daubert* factor that points toward inadmissibility would conflict with *Daubert* and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999).

Because they cannot avoid making these concessions, respondents attempt simply to persuade the Court that this case is a poor vehicle for resolving the questions presented and that the circuit conflict on the first question is less developed than we contend. First, they seek to deflect attention from the fatal flaws in their expert's methodology by presenting a skewed account of other alleged evidence that they contend demonstrated Ford's liability. Second, they try to convey the impression that the district court actually (if silently) made the required reliability determination and that Ford forfeited opportunities to press its *Daubert* challenge. Third, although they do not deny that the Tenth Circuit has recognized the "absolute necessity of district court findings on the record" under *Daubert* (*Goebel* v. *Denver & Rio Grand W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000)), they suggest that its decisions (as well as those of other circuits) do not conflict with the decision below because their precise reach is "uncertain." Br. in Opp. 21. And, fourth, respondents attack a grossly distorted version of Ford's position concerning what a district

court must do to discharge its obligation to explain its reliability determinations. When this smoke is cleared away, it is plain that this case merits review.

I. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE IMPORTANT AND RECURRING ISSUES PRESENTED

Respondents advance a variety of arguments aimed at confusing the issues or persuading the Court that this case is a poor vehicle for resolving the important and recurring issues of federal law raised in the petition. None of these arguments has merit.

a. Respondents attempt to blur the petition's focus on the shaky foundation for Richardson's opinions by describing *other* evidence that they contend supports their claims. Br. in Opp. 3-10. Although there is much to dispute in respondents' distorted characterization of the facts,[1] it is largely beside the point, because respondents' account does not come close to establishing that the district court's failure to screen Richardson's testimony was harmless error. As the court of appeals recognized (Pet. App. 4a, 18a), Richardson's testimony was an essential part of respondents' case, and Ford offered considerable evidence disputing their allegations regarding both design defect and accident causation. Because Richardson's testimony clearly mattered, a ruling that it should have been excluded indisputably would require reversal.

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[1] For example, respondents cite self-critical comments by Ford engineers concerning the Bronco II's design (Br. in Opp. 6), but they fail to disclose that these comments concerned *prototypes* of the vehicle that were never manufactured or sold. Similarly, the "J-turn" testing that respondents describe (*id.* at 6-7) involved an early prototype of the vehicle. Along the same lines, respondents' claim that only "cosmetic" changes were made to the vehicle between April 1982 and the commencement of production (*id.* at 8) is flatly inconsistent with the evidence that Ford made "real functional improvements" during that period. Pet. C.A. App. 1045.

Respondents next contend that Richardson's reliance on Ford's internal documents and developmental testing prove that his methodology was sound. Br. in Opp. 11-13. As Judge Ryan recognized, however, plaintiffs did not show that examining such materials "is a sound engineering methodology for evaluating vehicle design." Pet. App. 23a. In fact, the cited evidence plainly does not fill the gaping holes in Richardson's analysis. For example, respondents state that Richardson "criticized the Bronco II's stability index as too low" (Br. in Opp. 12) and point to evidence that Ford opted for a design having a stability index of 2.03 when an index of 2.25 might have been achieved (*id.* at 5). But Richardson was unable to say whether having the higher index would have made the vehicle safe, acknowledging that to reach that conclusion he "would have to test the final vehicle." Pet. C.A. App. 1380. Similarly, respondents point to statistics indicating that the Bronco II had a higher rollover rate than other SUVs. Br. in Opp. 3-4. However, Richardson failed to demonstrate that another type of SUV would have fared better given Slonsky's risky maneuvers in *this* accident. Pet. C.A. App. 1339-1341.[2]

Respondents also contend that both the district court and the court of appeals determined that Richardson's methodology was reliable because he relied on Ford's internal testing and documents. Br. in Opp. 10, 14, 28. In fact, as Judge Ryan correctly observed, the district court required absolutely "no evidence" that Richardson "employed recognized, reliable scientific or engineering methodology in reaching his conclusion that the Bronco II has handling and stability design defects." Pet. App. 22a. The passage of the district court's opinion cited by respondents – which addressed Ford's argument that the verdict was against the weight of the evidence

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[2] In any event, respondents confuse two issues: (1) whether Richardson's *conclusions* were based on *data* that were the result of some sort of testing; and (2) whether Richardson's *methodologies* (and theories of alternative design) *had themselves been tested*. The latter issue, not the former, is what *Daubert*'s testing factor targets.

– merely stated that, despite any weaknesses in Richardson's testimony, plaintiffs' other evidence made it "not impossible" for a jury to find in their favor. See Pet. App. 46a. As for the court of appeals, it *never* suggested that Richardson's theories had a reliable basis in testing by Ford. The majority acknowledged "Richardson's failure to test his theories" (Pet. App. 8a), and the dissenting judge stated unequivocally that Richardson "never tested his hypothesis" (*id.* at 24a).

b. As noted above, respondents cannot show that the district court ever screened Richardson's testimony under *Daubert*. Indeed, the evidence is to the contrary. According to the court of appeals, then-controlling Sixth Circuit authority would have precluded the district court from applying the *Daubert* factors when screening Richardson's testimony. See Pet. App. 5a n.3 (citing *United States* v. *Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997)).[3] Indeed, respondents never suggested to the court of appeals that the district court had made a reliability determination under *Daubert*. Instead, they stated that the court found Richardson "competent to opine" in various areas of expertise and argued that "Ford's attack on plaintiffs' expert goes to the weight of his testimony, not its admissibility." Pl. C.A. Br. at 16. Whether a witness is competent or qualified to testify as a expert, of course, is distinct from whether the expert's methodology is sufficiently reliable to be admissible.

In a footnote, however, respondents now assert that the district court would not have allowed Ford to question Richardson about his areas of expertise or to maintain a continuing objection to his testimony had it believed that *Daubert* was inapplicable. Br. in Opp. 20 n.13. That assertion is nonsensical. Both a preliminary inquiry into Richardson's qualifications and cross-examination concerning the foundations

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[3] In *Jones*, the Sixth Circuit refused to extend *Daubert* "outside the scientific realm," opining that this would "turn *Daubert* * * * on its head." 107 F.3d at 1158. This Court subsequently disagreed in *Kumho Tire*. But *Jones* was on the books when the district court decided Ford's motion *in limine*.

for his opinions would have been appropriate even if *Daubert* did not apply, because they would have gone to the weight the jury should assign to his testimony.

c. Respondents repeatedly imply that Ford forfeited its opportunities to challenge the reliability of Richardson's testimony in the district court. Br. in Opp. 1, 13-14. As the opinion below makes clear, however, Ford properly raised and preserved its *Daubert* challenge. See, *e.g.*, Pet. App. 5a ("Ford's motion *in limine* squarely raised the issue of reliability").

Respondents fault Ford for "delay[ing]" its challenge to the admissibility of Richardson's testimony until the week before trial. Br. in Opp. 13. But Ford filed its motion *in limine* on the same day that the parties filed all such motions – some of which were granted by the district court. Pet. C.A. App. 10-11, 15. Whether or not the court was justified in denying Ford a pretrial hearing, it remained obligated to screen Richardson's testimony under *Daubert*. Respondents do not seriously dispute this.

Respondents also criticize Ford for declining to conduct a voir dire of Richardson, electing instead to question him only on cross-examination. Br. in Opp. 14, 24. Here again, the suggestion that Ford was less than diligent in raising or preserving its *Daubert* challenge is unfounded. The district court's offer to allow Ford to conduct voir dire was limited to questions concerning Richardson's general qualifications. See Pet. App. 32a (court notes that plaintiffs had "asked to qualify [Richardson] generally" in mechanical engineering, machine design, vehicle dynamics, and accident reconstruction, and states, "[i]f you want to question him about that generally, fine"). The court agreed with Ford that questions concerning the bases for Richardson's opinions should be raised during cross-examination. See *ibid.* ("It seems to me that the kind of questioning you want to do would be best reserved for your cross-examination."). Ford's counsel proceeded to cross-examine Richardson in detail on issues relating to the reliability of his opinions (Pet. C.A. App. 1257-1388), yet the court

summarily overruled Ford's subsequent motion to strike Richardson's testimony. Pet. App. 34a.

There is thus no question that this case is a proper vehicle for resolving the conflict between the Sixth Circuit's decision and those of other circuits, as well as the tensions between the decision below and the framework established by *Daubert*, *Kumho*, and *Joiner*.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

The petition demonstrates that the Seventh, Tenth and Eleventh Circuits – in conflict with the Sixth Circuit – require trial courts to explain on the record their decisions to admit or exclude expert testimony under Rule 702 and *Daubert*. In attempting to rebut this showing, respondents suggest that the precise requirements imposed on the trial judge by these rulings are somewhat uncertain, and that the petition advocates a more stringent rule than the cases support. There is no question, however, that the reasonable rule adopted by the Tenth Circuit, which the petition supports, is flatly inconsistent with the Sixth Circuit's holding. Moreover, respondents do not even attempt to refute the other conflicts that the petition identifies – including conflicts with this Court's own decisions.

a. Seeking to rebut our showing of a circuit conflict concerning the need for trial courts to explain their admissibility determinations, respondents first contend that "the circuit courts agree that * * * a district court must ensure that there is a 'sufficiently developed record' to demonstrate that it performed its gatekeeping function." Br. in Opp. 21 (quoting *Goebel*, 215 F.3d at 1088). But, in this case, the Sixth Circuit considered "sufficiently developed" a record in which objections under *Daubert* were "squarely raised," and the trial court did nothing but "rule[] on the motions and objections" that challenged the testimony. Pet. App. 5a. By contrast, the Tenth Circuit has declared itself "convince[d]" of the "absolute necessity of

district court findings on the record" concerning the relevance and reliability of expert testimony. *Goebel*, 215 F.3d at 1088.[4]

Respondents next contend that the Tenth Circuit's decisions should be discounted because "the reach of its holding is uncertain." Br. in Opp. 21. In fact, the law in the Tenth Circuit is quite definitive. Aside from declaring the "absolute necessity" of explicit findings, the Tenth Circuit has *twice* ruled that the failure to make such findings before admitting expert testimony mandates reversal and a new trial. See *ibid.*; *United States* v. *Velarde*, 214 F.3d 1204 (10th Cir. 2000). That rule undoubtedly would have required reversal here. The conflict between the Sixth and Tenth Circuits is undeniable.

Respondents next attempt to distinguish *Goebel* on its facts, contending that this case departs from *Goebel* because "the reliability determination here is apparent from the record." Br. in Opp. 22 n.14. However, this case is virtually identical to *Goebel*. In *Goebel*, the district court denied a pre-trial motion to exclude expert testimony without any statement on the record of its reasons (215 F.3d at 1087); denied defendants' motion at trial to exclude the testimony "'on the basis of *Daubert*'" on the ground that the court "believe[d] there is sufficient foundation here for the jury to hear this testimony" (*ibid.*) (citations omitted); and denied a post-trial motion to strike the expert's testimony and enter judgment on the ground that "'the issue was raised by motion *in limine* and the court fully considered the matter when it denied that motion'" (*ibid.*) (citation omitted). The district court's treatment of the *Daubert* issue in this case

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[4] Respondents also insist that the decision below "expresses no opinion as to the extent to which a district court must document its *Daubert* analysis on the record." Br. in Opp. 23. But the Sixth Circuit expressly opined on that issue when it concluded that the district court had satisfied its obligations under *Daubert* despite the fact that it "did not explicitly recite that Richardson's testimony was relevant and reliable." Pet. App. 5a. The Sixth Circuit thus was unwilling to impose on district courts *even the minimal requirement* that they state their overall conclusions concerning reliability and relevance.

was indistinguishable; if anything, the court here said *even less* about its reasons for admitting the challenged testimony. Yet, while the Tenth Circuit reversed and ordered a new trial, the Sixth Circuit inferred from silence that the district court must have "determined Richardson's testimony was relevant and reliable." Pet. App. 5a.[5]

Respondents next contend that "none of the other circuits has stated the extent to which the district court must document its gatekeeping analysis in order to survive appellate review." Br. in Opp. 23. But any uncertainty about the precise contours of the findings required by *Daubert* makes this case more, not less, worthy of review.

Equally unavailing are respondents' efforts to minimize the conflict between the decision below and decisions of the Seventh and Eleventh Circuits. Citing *Ancho* v. *Pentek Corp.*, 157 F.3d 512, 517 (7th Cir. 1998), respondents first suggest (Br. in Opp. 23) that the Seventh Circuit requires only a minimal showing that the trial court made a reliability determination. But in *Ancho*, the district court *excluded* the challenged expert testimony, ruling that there was not "a prayer" of the expert "overcoming the bar" set by *Daubert*, and listing several specific ways in which the proffered testimony fell short. 157 F.3d at 516. Thus, the Seventh Circuit had ample basis – obviously far more than the court of appeals had here – for concluding that the district court had satisfied its gatekeeping obligation.

Finally, although respondents insist that the Eleventh Circuit has merely "encouraged" findings to facilitate appellate

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[5] *Velarde*, which respondents make no effort to distinguish, is equally at odds with the decision below. In *Velarde*, the district court denied plaintiffs' request for a *Daubert* hearing concerning the testimony of defendants' expert on the ground that the testimony was not "'new or novel.'" 214 F.3d at 1208 (citation omitted). Reversing and ordering a new trial, the Tenth Circuit stated that "*Kumho* and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination." *Id.* at 1209 (emphasis in original).

review (Br. in Opp. 23), they do not dispute our showing (Pet. 18) that district courts in the Eleventh Circuit believe they are required "to make findings of fact pertinent to and that justify the non-admissibility of [expert] testimony." *Shepherd* v. *Michelin Tire Co.*, 6 F. Supp. 2d 1307, 1309 (N.D. Ala. 1997) (citing *United States* v. *Lee*, 25 F.3d 997, 999 (11th Cir. 1994)).

b. To distract attention from the clear circuit conflict identified in the petition, respondents first caricature the rule that Ford supports and then argue that it is inconsistent with *Daubert* and *Kumho Tire*. According to respondents, Ford advocates "a formalistic and mechanical analysis of each of the *Daubert* factors" – a "checklist" that they contend will "compel numerous reversals for purely technical 'errors.'" Br. in Opp. 26. To support their portrayal of Ford's views, they selectively quote (*id.* at 25) a passage of the petition that describes aspects of the *Daubert* analysis, but delete the words indicating that a court "may" have to conduct the various steps of the inquiry in a particular case.

Respondents' transparent effort to distort Ford's position is easily rebutted. The petition, like the decisions of the Tenth Circuit, supports a straightforward rule requiring trial courts to "state their reasons for admitting or excluding expert testimony." Pet. 19. That rule would be as flexible as *Daubert* itself. Thus, if a court finds in a particular case that "the reliability of an expert's methods is properly taken for granted" (*Kumho Tire*, 526 U.S. at 152), it need only say that. In "the less usual or more complex cases where cause for questioning the expert's reliability arises" (*ibid.*), a more detailed statement of reasons would likely be required. Insisting that a trial court provide such an explanation would add little to the burden of conducting the *Daubert* inquiry itself, but would enable the courts of appeals to conduct the abuse of discretion review that this Court mandated in *Joiner*.

c. Respondents also fail to refute the existence of the other significant conflicts identified in the petition. As we explained in the petition (at 25-27), the Sixth Circuit went into conflict

with *Kumho Tire*, as well as with decisions of other circuits, when it ruled that "the district court, in its discretion, could have decided that Richardson's failure to test his theories went to the *weight* of his testimony regarding defects in the Bronco II, *not to its admissibility.*" Pet. App. 8a (emphasis added). As we noted, that statement converts the district court's discretion to decide "how to go about determining whether particular expert testimony is reliable" (*Kumho Tire*, 526 U.S. at 152) into a license to ignore *Daubert* altogether. It also ignores this Court's statement in *Kumho Tire* that a court "*should consider* the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Ibid.* (emphasis added). By indicating that a trial court is free to ignore the fact that an expert's methodology is untested, the Sixth Circuit's ruling also conflicts with decisions of other circuits, which have recognized the vital importance of *Daubert*'s testing factor in the context of engineering testimony concerning products defects. See Pet. 26-27.

Respondents apparently do not dispute that a court's failure to consider a relevant and applicable *Daubert* factor in favor of allowing the jury to weigh the evidence would impermissibly "yield[] a judicial determination to the jury." Br. in Opp. 28. Nor do they deny the importance of the testing factor. Instead, they argue that both the district court and the court of appeals believed that Richardson's reliance on Ford testing was an adequate substitute for a showing that his own methodology (and alternative designs) had been tested and shown to be reliable. *Ibid.* As explained above, however, neither court considered *Daubert*'s testing factor to have been satisfied by Richardson's references to Ford's testing data. See pages 3-4, *supra.* As Judge Ryan explained in dissent (Pet. App. 24a), the Sixth Circuit's statement that the district court could ignore "Richardson's failure to test his theories" is thus a plainly erroneous holding that should be reviewed by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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